IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

CRL.A.No. 1144 of 2006(A)

SC.134/2005 of ADDL.SESSIONS COURT (ADHOC)III, MANJERI
CP.17/2005 of JUDL. MAGISTRATE OF FIRST CLASS, MALAPPURAM

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APPELLANT:

GANAPATHY CHETTIAR,
S/O.VELAYUDHAN CHETTIAR,
C.NO.2781, CENTRAL PRISON,
KANNUR.

BY ADV. ADV.E.S.ASHARF(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 5-6-2007 , THE COURT ON 14/06/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 1144 of 2006

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Dated, this the day of 2006

JUDGMENT

In this Appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in Sessions Case No. 134 of 2005 on the file of the Addl. Sessions Court, Fast Track No. III (Adhoc) Manjeri challenges the conviction entered and the sentence passed against him for offences punishable under Sections 324 and 308 I.P.C.

2. The case of the prosecution can be summarised as follows:

On 26/2/2005 at about 10.45 a.m. inside the stationary shop belonging to one Narayana Menon (P.W.3) bearing Room No. 625/III of Kottakkal Panchayath, the accused out of his previous enmity towards P.W.2, Gopalakrishnan voluntarily caused hurt to him by cutting him with a sickle on the face causing a fracture of the facial bone and if P.W.2 had not avoided the blow it would have struck his neck causing his death. The accused has thereby committed offences punishable under Sections 324 read with Sec. 308 I.P.C.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offences, the prosecution was permitted to adduce evidence in support its case. The

prosecution altogether examined 8 witnesses as P.Ws 1 to 8 and got marked 8 documents as Exts. P1 to P8 and one material object as MO1.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He submitted that his brother's son had married the daughter of P.W.2 who was thus related to him and that the evidence tendered by the prosecution witnesses was false.

5. Since the trial court did not consider this to be a fit case for recording an order of acquittal under Sec. 232 Cr.P.C., the appellant was called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 22-10-2005 found the appellant guilty of the offences charged against him and sentenced him to Rigorous imprisonment for two years and to pay a fine of Rs. 5,000/- and on default to pay the fine to suffer simple imprisonment for three

months under Sec. 324 I.P.C. and to rigorous imprisonment for five years and to pay fine of Rs. 10,000/- and on default to pay the fine, to suffer simple imprisonment for six months under Sec. 308 I.P.C. The substantive sentences of imprisonment were directed to run concurrently. It is the said judgment which is assailed in this Appeal.

7. I heard Adv. Sri. E.S. Ashraf, the learned counsel who defended the appellant on State Brief and Adv. Sri.K.S.Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

P.W.1 (Abdul Karim) was the head constable of Kottakkal Police Station. He recorded Ext.P2 first information statement of the injured P.W.2 and registered Ext.P1 F.I.R. P.W.2 Gopalakrishnan is the injured first informant. He is an ex-service man who runs a fire-wood shop at Kattappadi in Kottakkal. He proved Ext.P2 First Information Statement and MO1 sickle. P.W. 3 (Narayana Menon) runs a stationery shop at Kottappadi in

Kottakkal. P.W.4 (Rajan) has coconut business at Kottappadi at Kottakkal. P,.W.4 had put his signature in Ext.P3 scene mahazar. P.W.5 Prakash is an attester to Ext.P4 recovery mahazar pertaining to MO1. P.W.6 (Haneefa) is another occurrence witness . P.W.7 (Somasundaran) is an attester to Ext.P3 scene mahazar, Ext.P5 arrest memo, Ext.P6 arrest notice and Ext.P4 seizure mahazar. P.W.8 (Dr.R. Satheesh) was the Chief Medical Officer of Al-Shifa Hospital, Perinthalmanna. He examined P.W.2 at 12.50 p.m. on 26-2-2005 on the allegation that he was assaulted by Ganapathi with a sickle. On examination, P.W.8 noted a lacerated wound at the root of the nose of P.W.2 and extending horizontally over the forehead from the right eye to the left eye fracturing the nasal bones. P.W.2 was discharged on 2-3-2006.

9. Assailing the conviction entered and the sentence passed against the appellant his learned counsel made the following submissions before me:-

The prosecution has not been able to prove the alleged motive. One Reena Krishnan and Raghavan who allegedly took P.W.2 to the hospital have not been examined by the prosecution. Since P.Ws 3 and 6 were persons very close to

P.W.2, their testimony can be taken only with a pinch of salt. One Abdu who is the nearest shop owner has not been examined. He would have been the best person to narrate the occurrence. The version of P.W.6 that he caught hold of the accused from behind and restrained him from further attacking P.W.2 and the accused thus abandoned his aggression on P.W.2, is too good a story to be believed. MO1 sickle which is the alleged weapon used for the offence and which was stated to be blood stained has not been sent for chemical examination. Even if the conviction recorded against the appellant is sustained the punishment awarded to him is excessive as he was aged 85 on the date of occurrence.

10. I am afraid that I cannot agree with the submissions on the merits of the occurrence. P.W.2 (Gopalakrishnan) is an ex-service man. He resides at Nayadippara at Kottakkal. He is conducting a fire-wood shop at Kottappadi. The accused also belongs to Nayadippara. According to P.W.2, the accused has no particular avocation and P.W.2 had questioned him with regard to certain thefts in that locality and also regarding the eve-teasing at the bathing ghat. What P.W.2 believes is that this had antagonised the accused. On 26-2-2005 at about 10.45 a.m. P.W.2 was sitting in the stationary shop of P.W.3 Narayana

Menon when the accused came there with a carry bag in which he had hidden MO1 sickle. Suddenly uttering that he would finish P.W.2. (നിന്നെ ഞാൻ ശരിയാക്കുമെടാ) . , the accused suddenly took out MO1 sickle from his carry bag and dealt a blow on the neck of P.W.2. The timely avoidance of the blow by P.W.2 resulted in the blow striking on his face resulting in P.W.2 sustaining an injury in between his eyes fracturing the nasal bone. P.W.6 who was just behind the accused, on seeing the occurrence caught hold of the accused from behind restraining him from mounting another attack on P.W.2. The accused thereupon proceeded towards Kavathikulam area along with the sickle in his hand. P.W.2 was then taken to Al-Shifa Hospital, Perinthalmanna from where the Doctor (P.W.8) examined him and issued Ext.P8 wound certificate which confirmed the assault on P.W.2. The above version of P.W.2 has been fully corroborated by P.W.3 (Narayana Menon) and P.W.6 Haneefa. The accused was arrested on the next day and he gave Ext.P4 (a) disclosure statement Investigating Officer resulting in the recovery of MO1 sickle on 27-2-2005 as per Ext.P4 seizure mahazar to which P.W.5 is an independent witness.

11. P.W.3 in whose stationary shop the occurrence took place is a natural witness. So also P.W.6 who is running a grocery shop near the place of occurrence is another natural witness whose presence at the place of occurrence is not at all accidental. Just because one Abdu who is stated to be the nearest shop keeper has not been examined by the prosecution, it does not follow that the occurrence is false. It has not been elicited from any of the witnesses also that the said Abdul had seen the occurrence.

12. Equally misconceived is the contention that the version of P.W.6 that he caught hold of the accused from behind and successfully dissuaded him from mounting a fresh attack on P.W.2 is incredible. The said version of P.W.6 is quite probable and natural.

13. The failure to send MO1 to the Chemical Examiner for detection of blood on the weapon also does not falsify the prosecution case.

14. After bestowing my anxious consideration of the oral and documentary evidence in the case, I have no hesitation to conclude that the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt. The conviction

was rightly entered against the appellant.

15. What now survives for consideration is the legality and extent and adequacy of the punishment. Even though the blow was aimed by the appellant on the neck of P.W.2, the fact remains that it actually did not strike the neck of P.W.2 but only his face causing an injury of such description as is punishable under Sec. 324 I.P.C. No doubt, in order to constitute the offence of attempt to commit murder punishable under Sec. 307 I.P.C. no injury need be caused to the victim. But the utterance of the accused that he will finish him off coupled with his act of giving a cut with a sickle would have definitely engendered a fear of death in the mind of P.W.2. That is sufficient to justify the conviction under Sec. 307 as well. But then it is only a technical conviction in which the appellant did not deserve imprisonment for a period of 5 years, particularly, when he was aged 85 years on the date of occurrence, I am therefore of the view that having regard to the advanced age of the accused and the pecuniary recompense in the form of fine to the government and compensation to P.W.2, the imprisonment awarded to the appellant for his conviction under Sec. 307 I.P.C. deserves to be reduced to two years instead of 5 years and I do so. Accordingly, for his conviction under Sec.

307 I.P.C., the appellant is sentenced to undergo rigorous imprisonment for two years. The fine portion as well as the direction to pay compensation in the judgment under appeal is not interfered with.

In the result, this appeal is allowed in part confirming the conviction entered but modifying the sentence as above.

V.RAMKUMAR, JUDGE.

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V. RAMKUMAR, J.
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Crl. Appeal No. 2501 of 2006 A
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Dated: 26-02-2007

JUDGMENT

In this appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C. 5/02 on the file of the Addl. Sessions Judge (Adhoc) II, Kalpetta, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 12-6-2000 at about 4.15 p.m. at a place called Naikupa the accused was found transporting 30 packets each of 100 ml. of Karnataka arrack in a private bus bearing Reg. No. KL W-2333, and that the accused has thereby committed offences punishable under Secs. 8(1) and (2) and Sec. 55 (a) of the Abkari Act.

3. On the accused pleading not guilty to the charge

framed against him for an offence punishable under Sec. 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.Ws 1 to 5 and got marked 7 documents as Exts. P1 to P7 and 28 packets of allegedly Karnataka arrack as M.O.1 series.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the Court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support there of. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 12-07-2006 found the appellant guilty of the offence punishable under Sec. 55(a) of the Abkari Act and sentenced him to undergo simple imprisonment for 5 years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to

undergo simple imprisonment for six months. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Sri. C.T. Justine, the learned counsel who defended the appellant on State Brief and Advocate Sri. K. S. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W.1 is the Excise Preventive Officer, Sulthan Bathery who detected the offence, arrested the accused and effected the search and seizure of the packets allegedly containing contraband arrack. P.W.2 is the Excise guard who was accompanying P.W.1. P.Ws 3 and 4 are respectively the Driver and Conductor of the bus from which the packets were seized. Both of them turned hostile to the prosecution. P.W.5 is the Excise Inspector who conducted the investigation and laid the charge before court.

9. After an anxious re-appraisal of the oral and documentary evidence in the case and after hearing both sides, I

am not satisfied that the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt. Even if the testimony of P.Ws 1 and 2 to the effect that the accused along with 30 packets containing the alleged contraband liquor was arrested from the bus as alleged, can be believed, the prosecution can succeed in bringing home the guilt of the accused only if the sample taken from the 30 packets in a tamper proof condition and which was eventually forwarded to the Chemical Examiner was on analysis found to contain Ethyl Alcohol of the requisite strength so as to conclude that it was illicit arrack. No doubt, Ext.P6 certificate of chemical analysis dated 17-08-2001 shows that the 200 ml. of sample on analysis was found to contain 35.04 percent by volume of Ethyl Alcochol.

10. Going by the testimony of P.W.1, the contents of two out of 30 packets were poured into a bottle containing 375 ml. and taken as sample after sealing the same. The detection, search and seizure were made on 12-6-2000. After sealing the sample bottle, P.W.1 claims to have seized the same under Ext.P2 seizure mahahzar prepared from the spot itself. Ext.P4 property list shows that the above sample along with the rest of the 28 packets were received in court only on 23-6-2000. They were

received as T.R.295/00. There is absolutely no link evidence to show as to the date on which the sample was actually despatched to the Chemical Examiner. The Prosecution was rest content with Ext.P6 certificate of analysis to show that the sample containing 200 ml. despatched from the J.F.C.M., Sulthan Bathery in C.R. No. 30/00 of Excise Range, Sulthan Bathery was analysed to find that it contained 35.04 percent by volume of Ethyl Alcohol. A perusal of Ext.P6 certificate of analysis shows that the sample was forwarded to the Chemical Examiner as per letter No. TR/295/2000, dated 22-6-2000. If the sample had reached the court only on 23-6-2000 and was received as T.R. 295/00 one fails to understand as to how on 22-6-2000 the J.F.C.M. , Sulthan Bathery could have forwarded the sample to the Chemical Examiner. What is more surprising is the fact that Ext.P5 forwarding note was filed by P.W.5 in court only on 25-8-2000. Ext.P6 certificate of analysis further shows that the sample in this case despatched along with the letter dated 22-6-2000 of J.F.C.M., Sulthan Bathery, was received in the Chemical Examiner's Laboratory at Kozhikode on 24-8-2000 which is the date on which P.W.5 had filed Ext.P5 forwarding note before Court. There was absolutely no attempt to explain away or

reconcile the glaring discrepancies referred to above. When the sample admittedly reached the court only on 23-02-2000 it could not have been despatched by the Magistrate to the Chemical Examiner on 22-06-2000. Even if it was despatched only on the next day after receipt of sample an explanation is due as to why it reached the chemical examiner only on 24-8-2006. There is absolutely no explanation forthcoming. Similarly, there is no contemporaneous record in the court of the committal Magistrate to indicate the date on which the sample was actually sent. No attempt was also made to examine the thondi section clerk concerned who had despatched the sample. The office copy of the covering letter of the Magistrate while forwarding the sample to the chemical examiner is also not seen retained, much less, marked as an exhibit. The conviction entered and the sentence passed by the learned Addl. Sessions Judge overlooking these glaring infirmities cannot, therefore, be sustained and are, accordingly, dislodged.

11. The appellant is found not guilty of the offence punishable under Sec. 55(a) of the Abkari Act and is acquitted thereunder. He is set at liberty. He shall be released from prison forthwith unless his continued detention is found necessary in

connection with any other case against him.

In the result, this Criminal Appeal is allowed.

V. RAMKUMAR
(JUDGE)

Kerala

RAMKUMAR, J.

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Crl. Appeal No. 2501 of 2006 A

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Dated: 26-02-2007

JUDGMENT

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V. RAMKUMAR,

(JUDGE)

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